SUPREME COURT, U. S.

FILED

DEC 17 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-7571

CITIZENS TO PRESERVE OVERTON PARK, INC., ET AL.,
Petitioners,

v.

ROBERT F. SMITH, COMMISSIONER,
TENNESSEE DEPARTMENT OF TRANSPORTATION
AND
CLAUDE S. BRINEGAR, SECRETARY,
UNITED STATES DEPARTMENT OF TRANSPORTATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN W. VARDAMAN, JR.
WILLIAMS, CONNOLLY & CALIFANO
1000 Hill Building
Washington, D. C. 20006

CHARLES F. NEWMAN
BURCH, PORTER & JOHNSON
130 North Court Avenue
Memphis, Tennessee 38103

Attorneys for Petitioners

December 1974

WILSON - BYRD PRINTING CO., INC. — No. 74-7571 — WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provision Involved	3
Statement	4
1. Prior Proceedings	4
2. Proceedings Below	5
Reasons For Granting The Writ	7
Conclusion	17

TABLE OF CITATIONS

CASES: Page

Alyeska Pipeline Service Co. v. *The Wilderness Society*, 73-1977, cert. granted, 43 U.S.L.W. 3208 (Oct. 15, 1974) 16, 17
Boston Chapter, NAACP v. *Beecher*, No. 74-1067 (1st Cir. Nov. 8, 1974) 10
Brandenburger v. *Thompson*, 494 F.2d 885, (9th Cir. 1974) 9, 11
Class v. *Norton*, No. 74-1702 (2nd Cir. Oct. 10, 1974) 10
Cooper v. *Allen*, 467 F.2d 836 (5th Cir. 1972) 15
Donahue v. *Staunton*, 471 F.2d 475 (7th Cir. 1972) 15
Edelman v. *Jordan*, 39 L.Ed. 2d 662 (1974) 9, 10, 11
Fairmont Creamery Co. v. *Minnesota*, 275 U.S. 70 (1927) 8
Gates v. *Collier*, 489 F.2d 298 (5th Cir. 1973) 9, 11
Hoitt v. *Vitek*, 495 F.2d 219 (1st Cir. 1974) 10
Jenkins v. *Georgia*, 41 L.Ed. 2d 642 (1974) 8
Jordan v. *Fusari*, 496 F.2d 646 (2nd Cir. 1974) 8, 10
Jordan v. *Gilligan*, 500 F.2d 701 (6th Cir. 1974) 7, 10, 12
La Raza Unida v. *Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972) 8, 9, 15
Lee v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971) 15
Named Individual Members of the San Antonio Conservation Society, 496 F.2d 1017 (5th Cir. 1974) 10, 11
Natural Resources Defense Council v. *EPA*, 484 F.2d 1331 (1st Cir. 1973) 15
Pyramid Lake Piute Tribe v. *Morton*, No. 74-342 7
Sims v. *Amos*, 340 F. Supp. 691 (M.D. Ala. 1972), *aff'd* 409 U.S. 942 (1972) 8, 10, 15
Skehan v. *Board of Trustees of Bloomsburg State College*, 501 F.2d 31 (3rd Cir. 1974) 7, 10, 12
Spence v. *Washington*, 41 L.Ed. 2d 842 (1974) 8
Taylor v. *Perini*, No. 73-2071 (6th Cir. 1974) 10, 12
Ex Parte Young, 209 U.S. 123 (1908) 11

TABLE OF CITATIONS—Continued

STATUTES AND REGULATIONS: Page

UNITED STATES CONSTITUTION

Eleventh Amendment ..... *passim*
Fourteenth Amendment 12

28 U.S.C. § 1254(1) 2

Department of Transportation Act, 49 U.S.C. § 1653(f) 4

Federal-Aid Highway Act, 23 U.S.C. § 138 ..... 4, 5

National Environmental Policy Act, 42 U.S.C. 4331 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

CITIZENS TO PRESERVE OVERTON PARK, INC., ET AL.,
Petitioners,

v.

ROBERT F. SMITH, COMMISSIONER,
TENNESSEE DEPARTMENT OF TRANSPORTATION
AND
CLAUDE S. BRINEGAR, SECRETARY,
UNITED STATES DEPARTMENT OF TRANSPORTATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, the Citizens to Preserve Overton Park, Inc., The Sierra Club, National Audubon Society, National Wildlife Federation, William W. Deupree, Sr., and Sunshine K. Snyder pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit entered September 26, 1974, denying petitioners an

award of attorneys' fees against Robert F. Smith, Commissioner of the Tennessee Department of Transportation, and the State of Tennessee.[1]

OPINIONS BELOW

The order of the court of appeals of which review is sought is not reported. It is printed in the Appendix, *infra*, pp. 12a-13a. The opinion of the court of appeals on the merits is reported at 494 F.2d 1212 and is printed in the Appendix, *infra*, pp. 3a-11a. The opinion of the district court is reported at 357 F. Supp. 846 and is printed in the Appendix, *infra*, pp. 14a-24a.

JURISDICTION

The order of the Court of Appeals for the Sixth Circuit was entered on September 26, 1974. (App., *infra*, 1a-2a). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in a case where an award of attorneys' fees to petitioners is appropriate under the "pri-

---

[1] The caption in the court of appeals' order refers to the respondent as "Charles W. Speight, Commissioner, Tennessee Department of Highways." In fact, Speight was succeeded by Robert F. Smith and the name of the Department of Highways was changed to the Department of Transportation. The petition filed in the district court instituting the litigation resulting in the appeal below was filed on behalf of "Robert F. Smith, Commissioner of the Tennessee Department of Transportation."

vate attorney general" rationale, the Eleventh Amendment bars such an award against a state official sued in his official capacity?

2. Whether, in the context of this case, the Eleventh Amendment is applicable to petitioners' request for an award of attorneys' fees against respondent Smith for the appeal below since the aspect of this litigation which produced the appeal was initiated by the state?

3. Whether petitioners are entitled to recover attorneys' fees against the state respondent under the "private attorney general" doctrine where petitioners successfully appealed a lower court decision in order to uphold the decision of the Secretary of Transportation prohibiting the construction of an interstate highway through a large public park in Memphis, Tennessee?

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

STATEMENT

1. Prior Proceedings

The underlying dispute in this case involves a proposal by the State of Tennessee to construct an interstate highway, I-40, through Overton Park, a large mid-city park in Memphis, Tennessee. In November 1969, the Secretary of Transportation approved construction of the highway through the park and authorized the federal government to pay 90% of its cost. Petitioners filed this action seeking injunctive relief on the ground that the Secretary had not complied with statutes designed to protect important public parks and recreation areas such as Overton Park. *See* § 4(f) of the Department of Transportation Act, 49 U.S.C. § 1653(f) and an identical provision in the Federal-Aid Highway Act, 23 U.S.C. § 138. Those statutes require that public parks such as Overton Park not be used for federal-aid highways unless there is no "prudent and feasible" alternative.

The district court granted summary judgment for the state and federal officials. 309 F. Supp. 1189 (W.D. Tenn. 1970), and the court of appeals affirmed. 432 F.2d 1307 (6th Cir. 1970). This Court reversed and remanded for a trial. 401 U.S. 402 (1971).

On remand, a plenary hearing was held in the district court. That hearing consumed 25 trial days and resulted in a transcript of over 6,500 pages with 240 exhibits. In its Memorandum Decision, the district court concluded that the Secretary's 1969 decision

approving the route through the park was illegal and, accordingly, vacated it. 335 F. Supp. 873. The court remanded the case to the Secretary for a new determination.

Following the remand from the district court, the Secretary announced that a new study of the highway would be made. Public hearings were held in Memphis and an Environmental Impact Statement was prepared pursuant to the requirements of the National Environmental Policy Act, 42 U.S.C. § 4331, *et seq.* On January 18, 1973 the Secretary announced a new decision. This time he determined that he could not, consistent with the law, approve the route through the park and he therefore rejected the state's request.[2]

2. Proceedings Below

Following the Secretary's 1973 decision rejecting the route through the park, the state respondent petitioned the district court to set aside that decision.

---

[2] The Secretarial Decision read in part:

> "On the basis of the record before me and in light of guidance provided by the Supreme Court, I find that an Interstate highway as proposed by the State through Overton Park cannot be approved. On that record I cannot find, as the Statute requires, and as interpreted by the courts, that there are no prudent and feasible alternatives to the use of parkland nor that the broader environmental protection objectives of the NEPA and the Federal-Aid Highway Act have been met, nor that the existing proposal would comply with FHWA standards on noise."

He argued that the Secretary's decision was improper because he did not specifically designate an alternative route that would avoid the park. The district court, agreeing with the state's position, determined that the Secretary's decision was illegal and vacated it. 357 F. Supp. 846. The district court opinion appears in the Appendix at pp. 14a-24a.

Petitioners and the Secretary of Transportation appealed. The court of appeals unanimously reversed. It held that the Secretary was not required to designate alternatives and that, in any event, the Secretary's explanation of his action, including the suggestion of possible alternative routes, was sufficient under the statute. The court of appeals opinion is reported at 494 F.2d 1212 and appears in the Appendix at pp. 3a-11a.

Following the decision of the court of appeals, petitioners filed a Bill of Costs in which they sought, *inter alia*, an award of attorneys' fees for attorneys' services in researching and writing the petitioners' briefs in the court of appeals, presenting oral argument and for various out-of-pocket expenses attributable to the appeal. Petitioners sought that award on the ground that they had served as "private attorneys general" in protecting the park from destruction by an interstate highway. While petitioners sought an award of fees solely for work on the appeal, they pointed out that counsel for the petitioners had spent approximately 2,700 hours on this litigation between the filing of the complaint and the notice of appeal.

Counsel's time records reflected 192 hours spent on the appeal below. In addition to the expenses for filing fees, duplication of briefs and transcripts, petitioners incurred out-of-pocket expenses in connection with the appeal totalling $1,049.[3]

The court of appeals awarded petitioners costs in the amount of $475.43 for filing fees, duplication of briefs and costs of the district court transcript. It refused to award attorneys' fees and out-of-pocket expenses on the basis of its decision in *Jordan* v. *Gilligan*, 500 F.2d 701 (6th Cir. 1974) *petition for cert. filed*, 43 U.S.L.W. 3240 (U.S. Oct. 9, 1974) (No. 74-403) which held that the Eleventh Amendment barred an award of attorneys' fees against a state official. A copy of the court of appeals' order appears in the Appendix at pp. 1a-2a.

REASONS FOR GRANTING THE WRIT

1. The question of whether the Eleventh Amendment immunizes a state or state official against an award of attorneys' fees is presented in petitions for certiorari in *Jordan* v. *Gilligan*, No. 74-403; *Taylor* v. *Perini*, No. 74-506; and *Skehan* v. *Board of Trustees of Bloomsburg State College*, No. 74-558.[4]

---

[3] Petitioners estimated that prior to the appeal they had paid out-of-pocket expenses of over $12,500 in pursuit of this litigation.

[4] The question of whether attorneys' fees can be awarded against the federal government is presented by the petition for certiorari in *Pyramid Lake Piute Tribe* v. *Morton*, No. 74-342.

As set forth more fully below, there is a clear, sharp conflict among the circuits on the issue presented by this case; the source of the conflict is a disagreement over the correct interpretation of three decisions of this Court. Thus the issue is one which must be resolved by this Court.

In *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70 (1927) this Court held that a state's sovereignty did not immunize it from an award of costs taxed against it in this Court. In that case the Court observed that the practice of taxing costs against a state when it was the losing party was one of long standing. The Court said: "We think that the rule, construed by long practice, justifies us in treating the state just as any other litigant and in imposing costs upon it as such . . . ." 275 U.S. at 77. That practice continues. See Judgments entered in *Jenkins* v. *Georgia*, 41 L.Ed. 2d 642 (1974) and *Spence* v. *Washington*, 41 L.Ed. 2d 842 (1974) taxing costs against the states. When attorneys' fees are awarded, they are frequently taxed as costs, and thus *Fairmont Creamery* has been read [5] as supporting the position that a state's sovereignty, as reflected in the Eleventh Amendment, does not bar an award of fees against a state or state official.

More directly on point is this Court's summary affirmance in *Sims* v. *Amos*, 409 U.S. 942 (1972).

---

[5] *E.g., La Raza Unida* v. *Volpe*, 57 F.R.D. 94, 101, n.11 (N.D. Cal. 1972) *appeal pending; Jordan* v. *Fusari*, 496 F.2d 646 (2nd Cir. 1974).

That was a reapportionment case in which a three judge district court awarded attorneys' fees to the plaintiffs against the Governor, Attorney General, and Secretary of State of Alabama, as well as state legislators. 340 F. Supp. 691 (M.D. Ala. 1972). The court rejected the argument that the state officials were immunized from the award of fees. 340 F. Supp. at 694, n.8. In their Jurisdictional Statement, the state officials specifically raised the question of whether sovereign immunity barred the award. See Jurisdictional Statement, No. 72-12, October Term 1972, p. 17. This Court affirmed without opinion. 409 U.S. 942. That affirmance has been relied upon in a number of cases holding that states and state officials are not immune from an award of fees.[6]

Last term, this Court decided *Edelman* v. *Jordan*, 39 L.Ed. 2d 662 (1974). In that case the plaintiffs sought, *inter alia*, retroactive payment of welfare benefits which had been wrongfully withheld. This Court drew a distinction between prospective injunctive relief which may be granted against a state official and retroactive relief which seeks an award of an accrued monetary liability from the state. The latter, the Court held, is barred by the Eleventh Amendment. In *Edelman* the Court specifically overruled several cases in which it had summarily af-

---

[6] See *e.g.*, *Gates* v. *Collier*, 489 F.2d 298, 302 (5th Cir. 1973), *rehearing en banc granted; Brandenburger* v. *Thompson*, 494 F.2d 885, 888 (9th Cir. 1974); *La Raza Unida* v. *Volpe*, 57 F.R.D. 94, 101 n.11 (N.D. Cal. 1972) *appeal pending.*

firmed district court decisions requiring retroactive payments of benefits over an Eleventh Amendment objection. 39 L.Ed 2d at 676-77. However, the Court did not disturb its affirmance in *Sims* v. *Amos, supra.*

Nevertheless the Courts of Appeals for the Third and Sixth Circuits have expressly refused to follow *Sims* v. *Amos* on the ground that *Edelman* was intended to overrule it. See *Skehan* v. *Board of Trustees of Bloomsburg State College*, 501 F.2d 31 (3rd Cir. 1974), *Jordan* v. *Gilligan*, 500 F.2d 701 (6th Cir. 1974), and *Taylor* v. *Perini*, No. 73-2071 (6th Cir. 1974). Those courts, as well as the Fifth Circuit panel in *Named Individual Members of the San Antonio Conservation Society*, 496 F.2d 1017 (5th Cir. 1974) *rehearing en banc granted*, read *Edelman* to bar an award of attorneys' fees against a state or a state official acting in his official capacity. In *Skehan* the court interpreted *Edelman* as "closing the door on any money award from a state treasury . . ." 501 F.2d at 43, n.7.

In post-*Edelman* opinions, the First and Second Circuits have held that the Eleventh Amendment as interpreted in *Edelman* does not bar an award of fees and costs against a state official in his official capacity. See *Class* v. *Norton*, No. 74-1702 (2nd Cir. Oct. 10, 1974);[7] *Boston Chapter, NAACP* v. *Beecher*,

---

[7] See also *Jordan* v. *Fusari*, 496 F.2d 646 (2nd. Cir. 1974) (*dictum*).

No. 74-1067 (1st Cir. Nov. 8, 1974).[8] As they point out, correctly we submit, *Edelman* recognized that in exercising jurisdiction over a state official under the *Ex Parte Young*, 209 U.S. 123 (1908) doctrine, a court's order may have an "ancillary effect" on a state's treasury and such an effect is permissible. 39 L.Ed.2d at 675. Since an award of fees and costs is not in the nature of damages but is instead incidental or ancillary to the court's proper exercise of jurisdiction, it is not barred by the Eleventh Amendment.

In pre-*Edelman* decisions the Ninth Circuit as well as a panel of the Fifth Circuit held that the Eleventh Amendment was not a bar to an award of fees against a state official. See *Brandenburger* v. *Thompson*, 494 F.2d 885 (9th Cir. 1974); *Gates* v. *Collier*, 489 F.2d 298 (5th Cir. 1973). The Fifth Circuit granted rehearing *en banc* in *Gates* as well as *Named Individual Members of the San Antonio Conservation Society*. Oral argument was presented on October 2, 1974; no decision has been rendered at this time. In *Gates* the United States participated as *amicus* and argued that the Eleventh Amendment was no bar to the award of fees.

Thus, at this time the Eleventh Amendment bars an award of fees against a state or state official in

---

[8] See *Hoitt* v. *Vitek*, 495 F.2d 219 (1st Cir. 1974) in which fees were awarded against state defendants. The Eleventh Amendment issue was not discussed.

the Third and Sixth Circuits; it does not in the First, Second, and Ninth, and the issue is before the full bench of the Fifth.

The issue presented here must be resolved by this Court. As a result of the expanding number of cases in which attorneys' fees may be awarded, the question arises with great frequency. The courts of appeals are sharply divided on the issue. Since the differences arise over the correct interpretation of three of this Court's decisions, only this Court can finally resolve the issue.

If the Court grants certiorari in one or more of the three cases presently pending, *Jordan* v. *Gilligan*, No. 74-403; *Taylor* v. *Perini*, No. 74-506; *Skehan* v. *Board of Trustees of Bloomsburg State College*, No. 74-558, the petition in this case should nevertheless be granted, for this case presents an aspect of the issue not present in *Jordan*, *Taylor* or *Skehan*. Each of those cases arose under the Fourteenth Amendment or statutes enacted to enforce that Amendment. Each raises the issue whether the Fourteenth Amendment limits the sovereign immunity granted to a state by the Eleventh Amendment. The present case, however, arises under federal environmental statutes and therefore presents the question free and clear of any limitation imposed by the Fourteenth Amendment. Since the question of the application of the Eleventh Amendment to an award of attorneys' fees against state officials arises frequently in cases which do not come under the Fourteenth Amendment, it is impor-

tant that this aspect of the issue be considered by this Court.

2. There is a further reason why the Eleventh Amendment is not applicable to this case. The aspect of the litigation necessitating the appeal was not a suit "commenced or prosecuted against one of the United States" and does not come within the terms of the Eleventh Amendment. It was, instead, commenced by the state respondent.

The facts relevant to this issue are as follows. When petitioners commenced litigation in December 1969 they challenged a decision by then Secretary Volpe made in November 1969 approving the route through Overton Park. Their complaint was concerned solely with the November 1969 decision. After the decision of this Court in 1971 and the trial on remand, the district court entered an order granting the relief prayed for by petitioners, *i.e.*, it set aside the 1969 decision. The order, styled Final Judgment, was a final resolution of the issues raised by the petitioners.

In January 1973 the Secretary of Transportation made a new determination, this time refusing to approve the route through the park. At that point the state respondent commenced this round of litigation by filing a Petition to Require the Federal Defendant to Comply with Terms of Remand Order or, in the Alternative to Dissolve Injunction as to State Defendant. That Petition in effect instituted a new

and separate action, even though it was filed under the same caption and number as the case which had been brought by petitioners attacking the 1969 decision. The issues raised by the state's petition were obviously different from those initially raised by petitioners since the state challenged a different administrative determination from that originally challenged by petitioners. The only similarity between the case brought by the state and that previously brought by petitioners was that they both involved the same highway and the same park.[9]

Since the litigation producing the appeal below was commenced by the state respondent and not by pe-

---

[9] After petitioners filed their notice of appeal below, the state respondent moved to dismiss the appeal on the ground that the district court's order was not final. The court of appeals rejected that contention and in doing so specifically recognized that the litigation producing the appeal below was initiated by the state. It said:

> "Thus, under [petitioners] view, the May 1, 1973 district court order opens a whole new stage of litigation, requiring new findings, involving realigned parties (since the Secretary and Citizens to Preserve Overton Park are now in agreement), considering legal issues not raised in the initial stages of the litigation. We must concur with the latter view. [The state's] petition of February 1, 1973, which the district court effectively granted in full, began a new stage of the litigation, effectively a new and different suit. The mere fact that the case comes to us under the original title does not make the decision appealed from into a minor piece of a continuing whole." Memorandum and Order of the Court of Appeals filed September 26, 1973, p. 16.

titioners, the Eleventh Amendment was clearly inapplicable.[10]

3. In the court of appeals, petitioners sought an award of attorneys' fees against the state respondent on the theory that they had acted in the role of a "private attorney general" in pursuing this litigation to protect Overton Park. They brought the original litigation, as well as the appeal below, to vindicate not only their own rights, but the rights of the public at large and they sought to ensure the effectuation of a strong congressional policy. Thus, they argued that they came within the "private attorney general" doctrine as developed by numerous lower court decisions.[11]

The court of appeals did not reach the question of whether, assuming the Eleventh Amendment was no

---

[10] It appears that there may have been an explicit waiver of the Eleventh Amendment in this case. In the argument before this Court on December 7, 1970, counsel for the state said,

> "Basically, the position of the State of Tennessee is that we should not be stayed, not by reason of any Eleventh Amendment issue which we have not raised and do not intend to claim sovereign immunity." (Tr. 36, Proceedings of December 7, 1970.)

[11] *E.g., Natural Resources Defense Council* v. *EPA*, 484 F.2d 1331 (1st Cir. 1973); *Donahue* v. *Staunton*, 471 F.2d 475 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973); *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971); *Cooper* v. *Allen*, 467 F.2d 836 (5th Cir. 1972); *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala. 1972), *aff'd* 409 U.S. 942 (1972); *La Raza Unida* v. *Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972), *appeal pending*.

bar, petitioners were entitled to an award. Nevertheless, we submit that the question of whether petitioners are entitled to an award of fees under the "private attorney general" doctrine is an appropriate issue to be considered by this Court at this time.

Alyeska Pipeline Service Co. v. *The Wilderness Society*, 73-1977, *cert. granted* 43 U.S.L.W. 3208 (Oct. 15, 1974) presents the question of whether the "private attorney general" rationale may be the basis for an award of attorneys' fees absent statutory authorization. This case presents a similar issue since there is no statutory authorization for an award to petitioners. It also presents, however, an aspect of that question which is not presented by *Alyeska*. In that case respondents were awarded attorneys' fees despite the fact that they did not prevail on a number of important issues and despite the fact that Congress specifically overruled the court of appeals decision on the merits of the controversy and permitted the Trans-Alaska pipeline to go forward without further judicial review and without the necessity of complying with certain federal statutes.

In this case, petitioners not only prevailed in the court of appeals, but they have, through their litigation, (a) been successful in setting aside a decision by the Secretary of Transportation to approve the location of I-40 through Overton Park; (b) are at least partially responsible for persuading the Secretary of Transportation to deny approval of a further proposal to locate I-40 through Overton Park; and

(c) have been successful in defending that decision in the court of appeals. If, as appears likely from the grant of certiorari in *Alyeska*, the Court intends to consider the "private attorney general" rationale as a basis for awarding attorneys' fees, then we submit that it would be useful to consider the application of the doctrine in a case where, as here, petitioners have been successful in protecting an area of great public interest such as Overton Park and where, unlike *Alyeska*, the Congress has not overruled the courts on the merits of the controversy.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN W. VARDAMAN, JR.
WILLIAMS, CONNOLLY & CALIFANO
1000 Hill Building
Washington, D. C. 20006

CHARLES F. NEWMAN
BURCH, PORTER & JOHNSON
130 North Court Avenue
Memphis, Tennessee 38103

Attorneys for Petitioners

December 1974

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 73-1668 and 73-1669

[Filed Sep. 26, 1974, John P. Hehman, Clerk]

CITIZENS TO PRESERVE OVERTON PARK, INC., ET AL.,
Plaintiffs-Appellants,

v.

CLAUDE S. BRINEGAR, Secretary,
U. S. Department of Transportation,
Defendant-Appellant,

and

CHARLES W. SPEIGHT, Commissioner Tennessee
Department of Highways,
Defendant-Appellee.

ORDER

Before: WEICK, CELEBREZZE and PECK,
Circuit Judges

Appellants request that the Court grant five categories of expenses enumerated in their Bill of Costs.

Items 1 through 3 are taxable as costs under Rule 39 of the Federal Rules of Appellate Procedure, and Appellees do not object to their being awarded.

1.	Filing fee for Court of Appeals	$ 25.00
2.	Duplication of briefs	307.73
3.	Cost of transcript of District Court proceedings	142.70
	Total	$475.43

Items 4 and 5, attorneys' fees and out-of-pocket expenses, may not be taxed against Appellee. In *Jordon, et al.* v. *Gilligan, et al.*, (6th Cir. No. 73-1973, July 18, 1974), we held, "We find no reasonable base for concluding that the Eleventh Amendment does not bar awards of attorneys' fees against the sovereign state." Slip Op. at 10. *See also Taylor* v. *Perini* —— F.2d —— (—— 6th Cir. 1974). No. 73-2071. We find that even though Commissioner Speight is the named defendant, he is a nominal defendant and the State of Tennessee is the real party in interest.

Therefore, it is ordered that the petition for costs be granted in the amount of $475.43.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 73-1668 & 73-1669

CITIZENS TO PRESERVE OVERTON PARK, INC., ET AL.,
Plaintiff-Appellant,

v.

CLAUDE S. BRINEGAR, SECRETARY, UNITED STATES DEPARTMENT OF TRANSPORTATION,
Defendant-Appellant,

and

CHARLES W. SPEIGHT, COMMISSIONER, TENNESSEE DEPARTMENT OF HIGHWAYS,
Defendant-Appellee.

APPEAL from the United States District Court for the Western District of Tennessee.

Decided and Filed April 3, 1974

Before: WEICK, CELEBREZZE and PECK, Circuit Judges

CELEBREZZE, Circuit Judge. This litigation began in 1969, when Secretary of Transportation, John A. Volpe, approved a 3.7 mile extension of Interstate Highway 40 through Memphis, Tennessee. Four thousand feet of this project was to cut through Overton

Park, a public wooded area in downtown Memphis. Citizens to Preserve Overton Park, Inc., organized to oppose the Secretary's action. They challenged his approval as contrary to § 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 1653(f). Section 4(f) states that "the Secretary of Transportation shall not approve any program or project which requires the use of any publicly owned land from a public park", among other areas,

> "unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park . . . resulting from such use."

The District Court granted summary judgment for defendants, 309 F. Supp. 1189 (W.D. Tenn. 1970). This decision was affirmed by this court with one judge dissenting. 432 F.2d 1307 (6th Cir. 1970). The Supreme Court reversed, holding that the District Court must review the full administrative record before the Secretary at the time of his decision in order to determine whether the Secretary "could have reasonably believed that in this case there are no feasible alternatives or that alternatives do involve unique problems" and whether the Secretary's decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." 401 U.S. 402, 415-416 (1971).

On remand, the District Court, having conducted a full hearing and having probed the prior administrative proceedings, concluded that the Secretary had made a proper decision as to the design of the proposed route and had only to determine whether the

Overton Park route was the sole feasible and prudent route. Thus, the Court remanded the case to the Secretary "only for the purpose of making a route determination in compliance with § 4(f) of the Department of Transportation Act of 1966 as that provision has been construed by the Supreme Court". The Court enjoined both the federal and state defendants from engaging in activities which would advance construction of the Overton Park route.

Secretary Volpe ordered a full review of the decision thereafter. Because of legislation passed and regulations issued after his initial approval of the route, the Secretary ordered the preparation of an environmental impact statement in accordance with § 102(c) of the National Environmental Policy Act of 1969, and the holding of a public hearing in compliance with § 5(b) of Policy and Procedure Memorandum 20-8, promulgated under the 1970 Federal-Aid Highway Act. After a searching administrative review of the matter, Secretary Volpe refused to approve the Overton Park route on January 18, 1973. He stated that the National Environmental Policy Act, the Federal-Aid Highway Act, and the noise standards set by the Federal Highway Administration, as well as the Supreme Court's interpretation of § 4(f), had weighed in his reconsideration of the matter:

> "On the basis of the record before me and in light of guidance provided by the Supreme Court, I find that an Interstate highway as proposed by the State through Overton Park cannot be approved. On that record I cannot find, as the Statute requires, and as interpreted by the

> courts, that there are no prudent and feasible alternatives to the use of parkland nor that the broader environmental protection objectives of the NEPA and the Federal-Aid Highway Act have been met, nor that the existing proposal would comply with FHWA standards on noise."

The Secretary noted "possible alternatives which the State of Tennessee may wish to consider," without endorsing a particular one or rejecting the "no build" alternative.

Commissioner Charles W. Speight, of the Tennessee Department of Highways (hereafter the State), responded to this rejection on February 1, 1973, by petitioning the District Court for an order requiring the Secretary "to comply with terms of remand order or, in the alternative, to dissolve injunction as to state defendant." The State argued that the Secretary had not made a "route determination" as required by the Court's original remand order. The State also argued that the Secretary had gone beyond the terms of the remand order in reconsidering the highway's design and that the Secretary had failed to discharge his 49 U.S.C. § 1653(f) obligation to make a route determination. The crux of the State's objection was that it was entitled either to proper approval of the Overton Park route or to a formal statement of what other route is prudent and feasible, along with specific findings of any other legal shortcomings of the Overton Park route. The State's fear was that the Secretary's rejection of the Overton Park route left it with no obvious direction—with no alternative proposal guaranteed of federal funding.

On May 1, 1973, the District Court granted the relief requested by the State. The Court found that the Secretary had not made the route determination required by his January 5, 1972 remand order. He therefore ordered the new Secretary of Transportation, Claude S. Brinegar, to perform several acts. First, the Secretary must either find unequivocally that there is no feasible and prudent alternative to the use of Overton Park land for interstate 40 (thus amounting to approval of that route), or state that there is at least one feasible and prudent alternative route and specify it, so that the court can review the correctness of that decision. Second, the Secretary must find and state for the record, if true, that the Overton Park route would violate the National Environmental Policy Act of 1969, the 1970 Federal-Aid Highway Act, or the noise standards of the Federal Highway Administration, and at least designate the respects in which such provisions would be violated by the construction of this project. Third, the Secretary need not reconsider approval of the Overton Park route (the putative rejection of January 18, 1973, having been found unlawful), but he may reconsider the design decision (a separate decision from the question of approving the park route in any form). Fourth, the Secretary must bear the burden of obtaining any additional information, as the District Court discharged the State of Tennessee from any further responsibility to produce information for the Department of Transportation. Finally, the Secretary must do all these things within 45 days.

In separate appeals, consolidated for review by this court, Citizens to Preserve Overton Park and the

Secretary of Transportation attack the District Court's decision. The Secretary argues that the District Court's interpretation of § 4(f) is "wholly foreign to the statutory scheme Congress has enacted to govern the use of federal funds in highway construction." Whereas the District Court held, and the State urges, that § 4(f) requires a formal statement of findings and reasons from the Secretary for rejecting the Overton Park route, the Secretary claims that under § 4(f) he is merely foreclosed from approving a proposal which would take parklands so long as he is not convinced that there is no prudent and feasible alternative to the use of such lands. The Secretary contends that upon such rejection, § 4(f) does not require anything more of him and that he need not affirmatively find that a particular feasible and prudent alternative exists. These differing interpretations of § 4(f) embody quite different conclusions as to what the Secretary must do to reject a state proposal for federal highway construction funds.

Our resolution of these conflicting statutory interpretations first requires a determination of the Secretary's scope of authority in considering proposals before him. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415-16 (1971). We find that the Secretary properly construed his authority. It is clear to us that the statute is designed to require the Secretary to scrutinize proposed highways for the protection of park lands, and places no affirmative duty on the Secretary to specify any particular route as a feasible and prudent alternative to the proposed route.[1]

---

[1] The statute is drafted in a negative manner and prohibits the Secretary from approving a proposed route unless

The State's main contention is that the Secretary's decision is procedurally inadequate because his failure to specify an alternate route prohibits adequate judicial review of his decision. We do not agree. As noted in the *Overton Park* case by the Supreme Court, formal findings are not required by either the Department of Transportation Act or the Federal-Aid Highway Act. 401 U.S. at 417. Here, the Secretary made suggestions as to possible alternative routes. A specific finding as to a particular route is not required. Thus, the Secretary's explanation of his action is not so vague as to frustrate judicial review. The validity of the Secretary's action must stand or fall on the propriety of that finding judged by the appropriate standard of review. *See Camp* v. *Pitts*, 411 U.S. 138, 142-43 (1973).

The burden of choosing the route does not, as the District Court held, lie with the Secretary. The Secretary only approves or disapproves a particular route. *Township of Hopewell* v. *Volpe*, 446 F.2d 167, 171 (3d Cir. 1971). The Federal-Aid Highway Act,

---

he finds that no feasible and prudent alternative exists. Had Congress intended that the Secretary specify an alternate route it would have been an easy matter to insert a requirement in the statute. However, the statutory requirements are minimal. In addition to the clear language of the statute, the legislative history of the Act reveals the primary purpose of the statute to be the protection of vital park lands, parks, historic sites and similar areas. U.S. Code Congressional and Administrative News 3482, 3499-3500, 90th Congress, 2d Session (1968). The language of 23 U.S.C. § 138 (Federal-Aid Highway Act of 1968) was amended to have the identical language as 49 U.S.C. § 1653(f). U.S. Code Congressional and Administrative News, 3482, 3538-39, 90th Congress, 2d Session (1968).

23 U.S.C. § 101 *et seq.*, prescribes the procedure to be followed in obtaining federal funds. 23 U.S.C. § 103(e) provides that

> "The routes of [the Interstate] system * * * shall be selected by joint action of the State highway departments of each State and the adjoining States, subject to the approval by the Secretary. * * *"

The first step in initiating a request for federal funds is provided in § 105(a):

> "As soon as practicable after the apportionments for the Federal-Aid systems have been made for any fiscal year, the State highway department of any State desiring to avail itself of the benefits of this chapter shall submit to the Secretary for his approval a program or programs of proposed projects for the utilization of the funds apportioned."

Following approval of the project plans are to be submitted to the Secretary:

> "* * * the State highway department shall submit to the Secretary for his approval, as soon as practicable after program approval, such surveys, plans, specifications, and estimates for each proposed project included in an approved program as the Secretary may require." 23 U.S.C. 106(a).

Thus, it is incumbent on the state to come forward with a particular route. *Arlington Coalition on Transportation* v. *Volpe*, 458 F.2d 1323, 1328 (4th Cir. 1972), *cert. denied*, 409 U.S. 1000; *Lathan* v. *Volpe*, 455 F.2d 1111, 1115 (9th Cir. 1971); *Town-*

ship of Hopewell v. *Volpe*, 446 F.2d 167, 171 (3rd Cir. 1971). If one route is disapproved, the burden is on the state to submit another proposal to the Secretary and at that time the Secretary would be required either to approve or disapprove the new proposal.

We hold that the Secretary has at this point complied with his duties under the statute. The order of the District Court remanding the case to the Secretary is therefore reversed.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed Apr. 3, 1974, James A. Higgins, Clerk]

Nos. 73-1668
73-1669

CITIZENS TO PRESERVE OVERTON PARK, INC., ET AL.,
Plaintiff-Appellant,

v.

CLAUDE S. BRINEGAR, SECRETARY, UNITED STATES DEPARTMENT OF TRANSPORTATION,
Defendant-Appellant,

and

CHARLES W. SPEIGHT, COMMISSIONER, TENNESSEE DEPARTMENT OF HIGHWAYS,
Defendant-Appellee.

APPEAL from the United States District Court for the Western District of Tennessee.

Before: WEICK, CELEBREZZE and PECK, Circuit Judges

JUDGMENT

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judg-

ment of the said District Court in this cause be and the same is hereby reversed.

It is further ordered that Plaintiffs-Appellants to recover from Defendants-Appellees, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

A True Copy.
Attest:

John P. Hehman, Clerk

Issued as Mandate:

COSTS: To be recovered by Appellants

Filing fee	$ 25.00
Printing	450.43
Total	$475.43

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Civil C-70-17

[Filed Apr. 19, 1973, Clerk, U.S. Dist. Court, Western Dist. of Tenn.]

CITIZENS TO PRESERVE OVERTON PARK, INC., ET AL,
Original Plaintiffs

and

SIERRA CLUB, ET AL,
Intervening Plaintiffs,

v

JOHN A. VOLPE, Secretary, Department of Transportation, and CHARLES W. SPEIGHT, Commissioner, Tennessee Department of Highways,
Original Defendants,

and

CITY OF MEMPHIS, ET AL,
Intervening Defendants

MEMORANDUM DECISION

This is an action to enjoin the Secretary of Transportation from releasing federal funds to the Highway Department of the State of Tennessee for construction of a segment of an interstate highway through Overton Park in Memphis. This Court granted summary judgment for defendants. 309 F. Supp. 1189 (1970). The Court of Appeals for the

Sixth Circuit affirmed. 432 F.2d 1307 (1970). The Supreme Court reversed and remanded for a plenary review of Secretary Volpe's approval of the release of federal funds for this project in November, 1969. 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). The evidentiary hearing was then held by this Court, and this Court's memorandum decision, filed January 5, 1972, is reported in 335 F.Supp. at 873.

In the memorandum decision, this Court held: (1) that Secretary Volpe had never actually made a route or corridor determination as is required by § 4(f) of the Department of Transportation Act of 1966, as amended, (49 U.S.C.A. § 1653(f));[1] and (2) that even if Secretary Volpe had made such a determination, his determination was based on an incorrect view of the applicable law. Accordingly, we remanded to the Secretary to make a route determination in accordance with the applicable law. We also ruled that the Secretary's approval of the proposed design of the interstate through Overton Park should stand and that he need not reconsider such approval.

There was no appeal of this Court's decision remanding to the Secretary.

On January 21, 1972, Secretary Volpe stated in a news release, in part:

> "I have asked for a complete analysis of the entire record that was before the court, with particular attention to alternative locations for this highway. That analysis will be done in the context of a thorough, detailed environmental im-

---

[1] An identical provision is contained in § 18(a) of the Federal-Aid Highway Act of 1968 (23 U.S.C.A. § 138).

> pact statement, which is required by the National Environmental Policy Act. Once this analysis is complete, a new decision will be made."

Thus the Secretary decided that, in making the determination under § 4(f) of the Department of Transportation Act of 1966, he must also comply with the National Environmental Policy Act of 1969, 42 U.S.C.A. § 4321 et seq., (NEPA). Secretary Volpe also decided to require additional route and design public hearings and such were held, combined, on September 14 and 15, 1972 in Memphis.

On January 12, 1973, the Acting Federal Highway Administrator wrote a memorandum to his superior, Secretary Volpe, attaching a 457 page final environmental impact statement prepared pursuant to NEPA. The memorandum concluded that it was the determination of that Administration under § 4(f) that there was no feasible and prudent alternative to the route through Overton Park and that the proposed design included all possible planning to minimize harm to the park.

On January 18, 1973, Secretary Volpe rendered his decision, which we quote in its entirety:

> "SECRETARIAL DECISION ON I-40,
> OVERTON PARK
> MEMPHIS, TENNESSEE
>
> In November 1969, I approved the designated route of I-40 through Overton Park in Memphis, Tennessee. The U.S. Supreme Court in March 1971 ruled that a lower court decision finding my approval in compliance with Section 4(f) of the Department of Transportation Act of 1966

was not substantiated by the record before the lower court. In January 1972, the U.S. District Court directed that the Department of Transportation make a new determination on this proposal in light of the Supreme Court decision.

This project has now been resubmitted by the State of Tennessee and come before me a second time for my approval. During the interim since my original action, the National Environmental Policy Act has been passed and signed into law. Thereafter the 1970 Federal Aid Highway Act added new requirements for consideration of environmental effects of highway projects, and in response to that requirement FHWA has set standards for the levels of noise around Federal aid highways. In addition, the Supreme Court, in its decision on this project, held that "protection of parkland was to be given paramount importance" and that "public parks were not to be lost unless there were truly unusual factors present" or "the cost or community disruption resulting from alternative routes reached extraordinary magnitudes." Each of these new developments has weighed in my deliberations.

On the basis of the record before me and in light of guidance provided by the Supreme Court, I find that an Interstate highway as proposed by the State through Overton Park cannot be approved. On that record I cannot find, as the Statute requires, and as interpreted by the courts, that there are no prudent and feasible alternatives to the use of parkland nor that the broader environmental protection objectives of the NEPA and the Federal-Aid Highway Act have been met,

nor that the existing proposal would comply with FHWA standards on noise.

Among the possible alternatives which the State of Tennessee may wish to consider are the use of the I-240 circumferential combined with improvements to arterial streets, alternative routes such as the L & N Railroad corridor and a broadened use of public transportation facilities and services or combinations of the above to meet the transportation needs in and around Memphis. Apart from alternative locations, I am also convinced that a tunnel design would be less harmful to the park than the present design. Listing these possible alternatives should not, of course, be construed either as an endorsement of any of them or as an exclusion of any other alternative that I have not mentioned. Likewise it should not be construed as a finding that the "no build" alternative has been rejected.

/s/ John A. Volpe
Secretary of Transportation

18 January 1973"

The State defendant has filed a petition to remand to the Secretary of Transportation, contending that Secretary Volpe did not, in his decision of January 18, 1973, make the determinations required to be made by the statutes to which he referred in his decision. The Secretary and the plaintiffs contend that he did make such determinations required by the statutes. The petition for remand is now before this Court for decision upon responses thereto, argument of counsel and briefs.

The Federal-Aid Highway Act provides the statutory scheme for cooperation between the federal and state governments for construction of highways and for financial contributions thereto by the federal government. This statutory scheme is outlined in *State Highway Commissioner of Missouri* v. *Volpe, Secretary*, —— F.2d —— (8th Cir. April 2, 1973), as follows (footnotes omitted):

> "Congress deemed it within the 'national interest to accelerate the construction of the Federal-aid highway systems' to serve local and interstate commerce and to enhance national and civil defense. 23 U.S.C. § 101(b) (1970). The objective of the Act was the creation of a National System of Interstate and Defense Highways. The system was to be completed 'as nearly as practicable' over the period of twenty years on an expedited construction basis.
>
> Based upon specific formulas set forth within the Act, the Secretary is required to apportion among the several states certain sums authorized to be appropriated for expenditures. 23 U.S.C. § 104 (b). After the apportionment, the states, through their respective highway departments, are to submit programs of proposed projects based upon the apportioned funds. The Secretary is instructed in Section 105(a) to 'act upon programs submitted to him as soon as practicable after the same have been submitted.' Section 106(a) then provides that 'as soon as practicable after program approval,' specific 'surveys, plans, specifications, and estimates for each proposed project' will be submitted to the Secretary for his approval. In this regard, Section 106(a) specifi-

> cally states that in approving the project plans 'the Secretary shall be guided by the provisions of section 109 of this title.' It is at this stage that the contract controls are imposed, for once a project is approved by the Secretary it 'shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto.' 23 U.S.C. § 106(a). On the basis of this approval, states are permitted to obligate the apportioned funds through the letting of construction contracts, etc. Section 118(b) provides that the sums 'available for expenditure' shall remain available for expenditure in that state for a period of two years after the close of the fiscal year for which the sums are authorized, and any funds not expended after that time shall lapse, except that unexpended funds apportioned for the Interstate System shall 'immediately be reapportioned among the other States. . . .' The final stage of the Act is the appropriation by Congress of money from the Highway Trust Fund to pay the state the proportional federal share of construction costs incurred in the partial or total completion of the highway projects."

Thus it will be seen that under this statute the state highway departments plan highway projects that are submitted to the Department of Transportation for consideration and approval and funding.

§ 4(f) of the Department of Transportation Act of 1966 (as does § 18(a) of the Federal-Aid Highway Act of 1968) provides that ". . . the Secretary shall not approve any program or project which requires the use of any publicly owned land from a

public park . . . unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park. . . ."

This provision, of course, does not, contrary to the statutory scheme created by the Federal-Aid Highway Act, shift to the federal Department of Transportation the burden of planning any highway projects. This provision does, however, impose upon the Secretary the additional burden, where a proposed project would use parkland, to determine whether there is, or is not, a feasible and prudent alternative. If he finds that there is no feasible and prudent alternative and that the project satisfies the applicable law in other respects (including the other requirements contained in the Federal-Aid Highway Act), he approves the project. However, if he finds that there is a feasible and prudent alternative, then he must, for this reason alone, disapprove the project.

In his decision of January 18, 1973, while it is clear that Secretary Volpe did not find that there is no feasible and prudent alternative, it is equally clear that he did not find that there is a feasible and prudent alternative. He simply said that ". . . I cannot find . . . that there are no prudent and feasible alternatives to the use of parkland . . ." and goes on to suggest ". . . possible alternatives[2] which the State

[2] One of the Secretary's suggested alternatives, the so-called L & N Railroad corridor, was urged by the plaintiffs at the evidentiary hearing in this court as a feasible and prudent alternative. In our remand decision (335 F.Supp. 873), we ruled that a decision by the Secretary that such is a feasible and prudent alternative would, under the evidence, be supportable.

of Tennessee may wish to consider. . . ." [3]

Plaintiffs and the Secretary contend here that even though the Secretary did not find that there is no feasible and prudent alternative, he had no obligation to find that there is a feasible and prudent alternative. Plaintiffs further contend that there is only a "semantic difference" between a finding that there is a feasible and prudent alternative and his decision that "I cannot find" that there is no feasible and prudent alternative.

As heretofore stated, this Court is of the view that, contrary to the contention of plaintiffs and the Secretary, the Secretary was obligated to do more than to decide that he could not find that there was no feasible alternative. In this context, the Secretary was obligated to find that there was a feasible and prudent alternative. We reach this conclusion from the content of § 4(f) itself. Under this provision, the Secretary may not approve use of park land unless there is no feasible and prudent alternative. Thus if he approves use of park land, he must find there are no such alternatives; on the other hand, if he disapproves such use, he must find that there is such

---

[3] The Secretary does not indicate in his decision that he was unable to make such finding because of an incomplete record. Neither the plaintiffs nor the Secretary so contend here. In point of fact, at the time of this decision the Secretary had before him: (1) the administrative record that was before him at the time of his November, 1969 approval; (2) the transcript of the six-week trial in this court; (3) the transcript of the additional public hearings held in September, 1972 in Memphis; and (4) the final 457 page environmental impact statement prepared by his Department with the cooperation of the State of Tennessee.

an alternative. Once the administrative record is, as it was here, sufficiently complete, the Secretary must make the decision, and if he refuses to do so, a decision may be compelled by a court. 5 U.S.C.A. § 706 (1).

We are further of the view that not only was the Secretary, in this context, obligated to find that there is a feasible and prudent alternative, but also he was obligated to at least designate such alternative or alternatives. We reach this conclusion because such is necessary if the State defendant is to have effective judicial review of the Secretary's finding that there is a feasible and prudent alternative.[4] Obviously, a court could not review a finding that there is a feasible and prudent alternative unless the Secretary designates what it is. This Court recognizes that the Supreme Court held in this case (401 U.S. at 417) that formal findings are not necessary, and that therefore the Secretary need not give reasons for finding that a designated alternative is a feasible and prudent one.

In his decision of January 18, 1973, Secretary Volpe also said ". . . I cannot find . . . that the broader environmental protection objectives of NEPA and the Federal-Aid Highway Act have been met, nor that the existing proposal would comply with FHWA [Federal Highway Administration] standards on noise."

---

[4] Neither plaintiffs nor the Secretary contend that the Secretary's disapproval of the use of park land is not subject to judicial review. In any event, we conclude that it is subject to such review, under 5 U.S.C.A. § 701, for the same reasons that the Supreme Court held in this case that the Secretary's approval of the use of park land in November, 1969, was subject to review under that provision.

This Court concludes that Secretary Volpe was obligated, in this context, to find that the Overton Park route or design violated the provisions of NEPA and the Federal-Aid Highway Act and the standards with respect to noise of the Federal Highway Administration. This Court further concludes that the Secretary was obligated to at least designate the respects in which such provisions would be violated by the construction of this project. We reach these conclusions for the same reasons that we reached such conclusions with respect to the Secretary's § 4(f) determination.

As heretofore stated, in our remand decision of January 5, 1972, we ruled that the Secretary was not required to reconsider his approval of the proposed design of the route through Overton Park. It is obvious that the Secretary did reconsider such design. It is still this Court's view that, since we have heretofore ruled that the Secretary's approval of the design should stand, the present Secretary need not reconsider it. It is also our view that, since a Secretary of Transportation has never made a valid route decision, the present Secretary may, in his discretion, reconsider the design decision.

Under these circumstances of long delay and the familarity of the officials in the Department of Transportation with this record, this Court is of the view that the remand order should require a decision within 45 days.

A remand order will be prepared for entry.

ENTER this 19th day of April, 1973.

/s/ Bailey Brown
Chief Judge

TABLE OF CONTENTS

Page

ORDER BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT 2

ARGUMENT 3

CONCLUSION 5

TABLE OF CITATIONS

CASES: *Page*

Daugherty v. *S & W Construction Co., Inc.*, 196 Tenn. 357, 268 S.W.2d 94 (1954) 5

Edelman v. *Jordan*, 39 L.Ed.2d 662 (1974) 3, 4

Hill v. *United States*, 453 F.2d 839 (6th Cir. 1972) 5

Jordan v. *Gilligan*, 500 F.2d 701 (6th Cir. 1974) 3

Moore v. *Tate*, 87 Tenn. 725, 11 S.W. 935 (1889) 5

Quinton v. *Board of Claims*, 165 Tenn. 201, 54 S.W.2d 953 (1932) 5

United States v. *Chemical Foundation, Inc.*, 272 U.S. 1 (1926) 5

STATUTES AND REGULATIONS:

UNITED STATES CONSTITUTION
Eleventh Amendment ..... *passim*

TENNESSEE CONSTITUTION
Article 1, §17 5

Tenn. Code Ann. §20-1702 (1955) 5

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. .....

CITIZENS TO PRESERVE OVERTON PARK, INC., ET AL.,
PETITIONERS

v.

ROBERT F. SMITH, COMMISSIONER,
TENNESSEE DEPARTMENT OF TRANSPORTATION

and

CLAUDE S. BRINEGAR, SECRETARY,
UNITED STATES DEPARTMENT OF TRANSPORTATION,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

The respondents, Robert F. Smith, Commissioner of the Tennessee Department of Transportation, and the state of Tennessee, pray that the Petition for a Writ of Certiorari to review the order of the United States Court of Appeals for the Sixth Circuit entered September 26, 1974, denying petitioners an award of attorneys' fees against the respondents, be denied.

ORDER BELOW

The order entered in the court below is not reported, but it is appended to the petition for a writ of certiorari.

JURISDICTION

Respondents do not question the jurisdiction as set forth in the petition.

QUESTIONS PRESENTED

The questions as presented by the petitioners are disingenuously framed and fail to define sharply the issues presented to the Sixth Circuit and now before this Court. Petitioners' claim for attorneys' fees from respondents raises the questions as set forth below:

1. Whether petitioners were arguably acting as private attorneys general in the appeal below?
2. Whether the Eleventh Amendment and state sovereignty bar an award of attorneys' fees against the sovereign state and its officials?
3. Whether the state of Tennessee has waived its sovereign immunity and the constitutional right secured to it by the Eleventh Amendment?

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State."

STATEMENT OF THE CASE

Petitioners' statement of the case is substantially correct. Respondents would emphasize that the appeal for which petitioners claim attorneys' fees involved a dispute between

respondents and the Secretary of Transportation. Prior to respondents' petition to the District Court which led to the appeal for which the fees are claimed, they and the Secretary were co-defendants and, obviously, in agreement on the issues. When respondents succeeded in vacating the Secretary's decision as not in compliance with the district judge's remand order, the Secretary appealed. His appeal was handled by the Justice Department of the United States.

ARGUMENT

Although other issues—among which was the applicability of the so-called "private attorney general" doctrine —were briefed for the Sixth Circuit, the order below is predicated solely on the Eleventh Amendment and sovereign immunity. The Court of Appeals for the Sixth Circuit resolved this key issue on the basis of *Jordan* v. *Gilligan,* 500 F.2d 701 (6th Cir. 1974), a decision which followed and relied on *Edelman* v. *Jordan,* 39 L.Ed.2d 662 (1974).

Footnote 9 at page 14, Petition for a Writ of Certiorari, points out that the Court of Appeals for the Sixth Circuit ruled that the State's petition of February 1, 1973 effectively began a new lawsuit. Indeed, petitioners claim at page 14 of their Petition that: "[T]he only similarity between the case brought by the state and that previously brought by petitioners was that they both involved the same highway and the same park."

Thus, in scratching about to find arguments for waiver of immunity and inapplicability of the Eleventh Amendment, the petitioners have shown this Court, more persuasively than the most brilliant of opposition briefs could, why their Petition should be denied.

In their brief to the Sixth Circuit, the petitioners reviewed the three classes of equitable exceptions to the general rule that the losing party to litigation is not responsible

for the attorneys' fees of the adversary. They conceded that only the "private attorney general" exception could apply to their claim.

By pointing out to this Court that new litigation had been instituted and that they were aligned with the Secretary of Transportation, petitioners have denied themselves even a colorable claim to being private attorneys general. The essence of the "private attorney general" doctrine is that plaintiffs through litigation have effectuated strong congressional policy or prevented government officials from breaking their own laws. In the instant case, the effort of petitioners was not even necessary to resist the State's petition. Notice of appeal was filed by the government, and that appeal would have been prosecuted regardless of petitioners' participation. Respondents respectfully submit that the Justice Department of the United States is adequate legal representation for a federal official, and petitioners can most accurately be seen as amicus curiae in the appeal for which they claim fees.

The threshold question is whether the Eleventh Amendment and state sovereignty protect a state and its officials from awards of attorneys' fees for private litigants.

Respondents submit that this should be a settled issue in American law, particularly after this Court's opinion in *Edelman* v. *Jordan, supra. Edelman* clearly presented the issue of state sovereignty under the Eleventh Amendment, and the ruling in that case, that a claim which seeks to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment, is applicable to the instant claim. To include attorneys' fees under the heading of "costs," as petitioners have, does not conceal the fact that whereas "costs" are generally nominal, attorneys' fees are most often substantial.

Petitioners contend that respondents' initiation of the litigation which led to the appeal vitiates state sovereignty and Eleventh Amendment protection. However, this Court,

in *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1 (1926), held that officials of the United States could not by the act of bringing suit for the government waive its sovereign immunity against the imposition of costs and fees. Only Congress can waive the federal government's immunity.

The doctrine of sovereign immunity prevails under Tennessee law. See Tenn. Const. Art. 1, §17 and Tenn. Code Ann. §20-1702 (1955). Both state and federal courts have held that the state's immunity cannot be waived absent affirmative legislative authority. *Hill* v. *United States*, 453 F.2d 839 (6th Cir. 1972); *Daugherty* v. *S & W Construction Co., Inc.*, 196 Tenn. 357, 268 S.W.2d 94 (1954); *Quinton* v. *Board of Claims*, 165 Tenn. 201, 54 S.W.2d 953 (1932); *Moore* v. *Tate*, 87 Tenn. 725, 11 S.W. 935 (1889).

The requirement of authoritative, unmistakable action by the legislature in order to waive the state's immunity should be honored by this Court, especially in view of the fact that Congress has not required a waiver in order to participate in the federal program which is involved in the Overton Park controversy.

Petitioners, at Footnote 10, page 15, Petition for a Writ of Certiorari, claim an explicit waiver of Eleventh Amendment protection during oral argument before this Court in December, 1970. Yet, at the previous page, they are advising this Court, and attempting to rely on it, that the Sixth Circuit has ruled that the State's petition initiated new litigation. Notwithstanding the settled legal principle that only a state's legislature can waive its sovereign immunity, the fact that new litigation was proceeding precludes petitioners' reliance on an alleged waiver in a prior case.

CONCLUSION

Respondents respectfully submit that since the appeal for which petitioners claim attorneys' fees involved a dis-

pute between the state of Tennessee and the Secretary of Transportation, and since the Secretary's appeal was handled by the Justice Department, the petitioners fail to state even an arguable claim to being private attorneys general.

Furthermore, since petitioners seek to impose a liability which would have to be paid from public funds of the State, their claim is barred by the Eleventh Amendment and state sovereignty. No waiver of this constitutional right has occured.

Respectfully submitted,

J. Alan Hanover
Donald W. Schwendimann

HANOVER, WALSH, BARNES & JALENAK

219 Adams Avenue
Memphis, Tennessee 38103

Attorneys for Respondents

LIBRARY
SUPREME COURT, U. S.
FILED
FEB 13 19
MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-757

CITIZENS TO PRESERVE OVERTON PARK, INC., ET AL.,
Petitioners,

v.

ROBERT F. SMITH, COMMISSIONER,
TENNESSEE DEPARTMENT OF TRANSPORTATION

AND

CLAUDE S. BRINEGAR, SECRETARY,
UNITED STATES DEPARTMENT OF TRANSPORTATION,
Respondents.

PETITIONERS' REPLY BRIEF

JOHN W. VARDAMAN, JR.
WILLIAMS, CONNOLLY & CALIFANO
1000 Hill Building
Washington, D. C. 20006

CHARLES F. NEWMAN
BURCH, PORTER & JOHNSON
130 North Court Avenue
Memphis, Tennessee 38103

Attorneys for Petitioners

February, 1975

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-757

CITIZENS TO PRESERVE OVERTON PARK, INC., ET AL.,
Petitioners,

v.

ROBERT F. SMITH, COMMISSIONER,
TENNESSEE DEPARTMENT OF TRANSPORTATION

AND

CLAUDE S. BRINEGAR, SECRETARY,
UNITED STATES DEPARTMENT OF TRANSPORTATION,
Respondents.

PETITIONERS' REPLY BRIEF

---

1. The state respondent argues that petitioners are not entitled to legal fees under the "private attorney general" doctrine on the ground that their participation in the proceeding below was unnecessary since the Department of Justice, which also participated below, was on the same side as petitioners. The state's argument is a smoke screen designed to conceal what actually happened. Peti-

tioners' participation was necessary and appropriate not only because of their long standing interest as a party to this litigation, but also because there was grave doubt whether the Department of Justice would defend the 1973 decision of the Secretary of Transportation prohibiting construction of the highway through Overton Park.

At the first hearing on the state's petition, the United States Attorney inexplicably refused to defend the Secretary's decision.[1] Indeed, he sided with the state in suggesting a remand. Petitioners bore the entire burden of defending the Secretary's decision and the United States Attorney made clear his disagreement with petitioners.[2] Once the district

---

[1] The United States Attorney was the same counsel who had contended during the six week trial in 1971 that it was lawful for the highway to go through the park.

[2] After the United States Attorney indicated disagreement with petitioners' position, the following colloquy occurred:

> THE COURT: "Let me interrupt you a minute. You agree at this point that there is no way for the Court to review his [the Secretary's] decision that there is a feasible and prudent alternative until he says what it is, or they are, and, therefore, it would seem to me it would require a remand to him to say what it is or they are before I could review anything."
>
> MR. TURLEY [U.S. Attorney]: "Except that Your Honor in this sense is reviewing what he has done up to now by saying that it is indecisive. It isn't sufficient to put the matter in proper cast for the Court to further review, and that we ought to be able to get a definitive review in this litigation and the matter of a remand would produce that."
>
> THE COURT: "Right."
>
> MR. TURLEY: "But in ordering a remand Your Honor would be reviewing in a sense there."

[Footnote continued on page 3]

court granted the state's petition and vacated the Secretary's 1973 decision, the United States Attorney, rather than noting an appeal, "resigned" from the case and refused to play any further role in the litigation. Thus, it is ludicrous to suggest, as the state respondent does, that petitioners should have refrained from any action at that critical juncture of the litigation and left their interest in the hands of the Department of Justice. Instead, petitioners filed a notice of appeal in order to seek to reinstate the Secretary's 1973 decision. Subsequently, the Solicitor General authorized an appeal on behalf of the Secretary. The United States Attorney publicly criticized that decision in the local press and refused to file the notice.[3] It was necessary for the Department of Justice to dispatch an attorney from Washington to note the appeal. The United States Attorney's name is conspicuously absent from the notice of appeal and the briefs filed on behalf of the Secretary in the court of appeals.

---

[2] [Continued]

THE COURT: "All I would be doing is construing 4(f) and the Administrative Procedure Act and saying, put the two of them together, there is no way for me to review his determination that there is a feasible and prudent alternative unless he says what it is."

MR. TURLEY: "That's true."

(Tr. 16-17; Proceedings Before the United States District Court for the Western District of Tennessee, March 24, 1973)

Later the United States Attorney offered to expedite a remand by fixing the time limits for a new decision by the Secretary (Tr. 57-58).

[3] The Commercial Appeal, May 30, 1973 at 17; Memphis Press-Scimitar, May 30, 1973 at 18.

In the face of those events, petitioners were justified in believing that their participation was necessary to protect the 1973 decision of the Secretary. Indeed, in the court of appeals, counsel for petitioners was the only lawyer opposing the state respondent who had participated in the prior litigation, including the six week trial in the district court in 1971 and in commenting on the Environmental Impact Statement which ultimately ran 457 pages. In view of petitioners' counsel's greater familiarity with the factual background of the litigation, the Department of Justice agreed that petitioners' counsel should be the lead counsel at the oral argument in the court of appeals. Thus, in view of the foregoing, we believe it is a gross misrepresentation for the state respondent to characterize petitioners' role below as one of "amicus curiae" (Respondent Br. 4).

The state respondent's argument also overlooks the fact that since petitioners initiated the original litigation in 1969, and since the state's petition was filed under the caption of that litigation, petitioners were necessarily made parties below and required to participate, at least in the district court. When petitioners' actions in this litigation are viewed in light of the foregoing, as well as the result achieved below, we submit that they clearly come within the "private attorney general" rationale.

2. In our petition we pointed out that the Eleventh Amendment was inapplicable to the litigation which

produced the appeal below because it was not a suit "commenced or prosecuted against one of the United States . . . ." It was, instead, commenced by the state respondent. The state respondent argues that the initiation of litigation does not amount to a waiver of Eleventh Amendment immunity. The point, however, is not that the initiation of litigation constitutes a waiver of Eleventh Amendment immunity. The point is that the Eleventh Amendment applies only to suits "commenced or prosecuted *against* one of the United States" (emphasis supplied), not to litigation commenced or prosecuted *by* one of the states. Thus the question is not one of waiver, but rather of the applicability of the Eleventh Amendment in the first instance. Here it is clearly inapplicable.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition for a Writ of Certiorari, it is respectfully submitted that certiorari should be granted.

Respectfully submitted,

JOHN W. VARDAMAN, JR.
WILLIAMS, CONNOLLY & CALIFANO
1000 Hill Building
Washington, D. C. 20006

CHARLES F. NEWMAN
BURCH, PORTER & JOHNSON
130 North Court Avenue
Memphis, Tennessee 38103

Attorneys for Petitioners

February, 1975